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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

SUN COUNTRY AIRLINES, INC.,
Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an administrative agency that adopts a final rule, and thereby reverses a prior decision by the agency not to promulgate substantially the same rule, must provide a reasoned analysis in support of the change that not only evinces an awareness of the prior decision but also explains the reasons for taking a different course.

2. Whether the Court of Appeals erred in concluding that the FAA's 1989 industry study on flight attendant duty times prompted the agency to rethink the premises underlying its prior decision not to promulgate essentially the same flight attendant duty period and rest requirements.

LIST OF PARTIES TO THE PROCEEDING PURSUANT TO RULES 14.1(b) AND 29.1

Pursuant to Supreme Court Rule 14.1(b), Petitioner Sun Country Airlines, Inc. certifies that the names of all parties to this proceeding appear in the caption of this petition for a writ of *certiorari*.

Pursuant to Supreme Court Rule 29.1, Petitioner Sun Country Airlines, Inc. certifies that it is a charter air carrier certificated by the FAA under Part 121 of the Federal Aviation Regulations. Sun Country does not have any outstanding publicly-traded securities, nor does Sun Country have a publicly-owned parent, subsidiary, or affiliate.

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PETITION FOR A WRIT OF CERTIORARI

Sun Country Airlines, Inc. respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a-3a) is referenced in a "Table of Decisions Without Reported Opinions" in the Federal Reporter. *See* 56 F.3d 1531.

The final rule of the Federal Aviation Administration ("FAA") promulgated in Docket No. 27229, "Flight Attendant Duty Period Limitations and Rest Requirements," was published at 59 Fed. Reg. 42974-42994 (August 19, 1994) (the "Final Rule") (App. 4a-85a).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on May 30, 1995 (App. 1a). The Court of Appeals denied Sun Country's timely petition for rehearing and suggestion for rehearing *in banc* on July 28, 1995 (App. 86a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 49 U.S.C. § 46110(e).

The Court of Appeals had jurisdiction over the proceeding below pursuant to 49 U.S.C. § 46110.

REGULATIONS INVOLVED

The Final Rule will be codified by amending 14 C.F.R. Parts 121, 125 and 135. *See* Final Rule, 59 Fed. Reg. 42974-42994 (August 19, 1994) (App. 4a-85a).

STATEMENT OF THE CASE

This case involves regulations promulgated by the FAA in its Docket No. 27229, Flight Attendant Duty Period Limitations and Rest Requirements, 59 Fed. Reg. 42974-42994 (August 19, 1994) (App. 4a-85a). The Final Rule requires that air carriers establish duty period scheduling limitations and rest requirements for flight attendants.

Petitioner Sun Country Airlines, Inc. ("Sun Country") is a charter air carrier certificated by the FAA under Part 121 of the Federal Aviation Regulations ("FAR"). Sun Country employs over 300 flight attendants. Sun Country was a participant, and submitted comments, in Docket No. 27229. Sun Country is subject to the new regulations.

I. STATUTORY AND REGULATORY BACKGROUND.

The Administrator of the FAA is empowered to prescribe "reasonable rules and regulations governing, in the interest of safety, the maximum hours or periods of service of airmen, and other employees" of regulated

carriers.[1] The term "airman" includes (1) flight crewmembers, *i.e.*, pilots, mechanics, engineers or other members of the crew engaged in the navigation of an aircraft while aloft, (2) ground mechanics, (3) aircraft dispatchers and (4) air traffic controllers.[2]

Flight time limitations for pilots were first mandated by Decision 83 of the National Labor Relations Board (May 10, 1934), which was incorporated into section 401 of the Civil Aeronautics Act of 1938 and section 401(k) of the 1958 Act.[3] Duty limitations for "airmen" are currently set forth in the FAR. Flight attendants are not airmen or flight crewmembers engaged in the navigation of an aircraft, but are considered "other employees" by the FAA for the purpose of prescribing duty limitations "in the interest of safety."[4]

A. The Prior Rulemaking.

In late 1984 and early 1985, the FAA received two petitions for rulemaking seeking promulgation of flight attendant duty period limitations and rest requirements essentially the same as those adopted by the FAA in

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[1] Federal Aviation Act of 1958 (the "1958 Act"), Pub. L. No. 85-726, § 601(a)(5), 72 Stat. 731, 775 (previously codified at 49 U.S.C. App. § 1421(a)(5) (1988)) (current version at 49 U.S.C.A. § 44701(a)(4) (West Supp. 1995). Pub. L. No. 103-272 (July 5, 1994) mandated revision and codification of numerous transportation related statutes "without substantive change." 108 Stat. 745. Upon recodification, the word "reasonable" in § 601 of the 1958 Act (previously 49 App. U.S.C. § 1421(a)) was omitted as surplus. 108 Stat. 1185. The current official United States Code for Title 49 is not available at this time. All citations herein to Title 49 are to United States Code Annotated (West Supp. 1995).

[2] 49 U.S.C.A. § 40102(a)(8) (West Supp. 1995).

[3] 49 U.S.C.A. § 42112 (West Supp. 1995).

[4] 58 Fed. Reg. 17025 (App. 139a); FEDERAL AVIATION ADMINISTRATION, REPORT ON THE STUDY OF CURRENT INDUSTRY PRACTICE: FLIGHT ATTENDANT FLIGHT, DUTY, AND REST TIMES 2-2 (September 12, 1989).

Docket No. 27229. On December 19, 1984, a petition for rulemaking was filed by the Association of Fight Attendants ("AFA") seeking flight attendant flight and duty time limitations equivalent to those applying to flight crewmembers (*i.e.* pilots, etc.), except insofar as the flight crewmember regulations allow longer than eight hours of daily flight time in a single duty period and allow for any rest period shorter than nine hours.[5] A petition filed on April 23, 1985 by the Joint Council of Flight Attendant Unions ("JCFA") sought flight attendant duty period limitations of 14 hours for international flights and 13 hours for domestic flights, with varying rest requirements.[6]

Both the AFA and JCFA petitions contended that duty period limitations and rest requirements were necessary to protect flight attendants from extremely long and exhausting duty periods, which may lead to fatigue and a diminished ability to perform safety-related functions. NPRM, 59 Fed. Reg. 17024 (App. 136a). Due to the common subject matter of the two petitions, they were considered jointly in FAA Docket No. 24397. *Id.*

Numerous parties submitted comments in support of the petition, including the AFA, union members of JCFA, individual flight attendants, the National Transportation Safety Board ("NTSB"), the Air Line Pilots Association ("ALPA"), the International Airline Passengers Association ("IAPA"), the Director of Aerospace Medicine at Wright State University ("Wright State"), and several members of Congress. The commenters generally agreed that fatigue affects performance, but did not cite any studies directly related to flight attendants. *Id.* (App. 136a-137a).

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[5] *See* 58 Fed. Reg. 17024 (App. 135a-136a); 50 Fed. Reg. 6165 (Feb. 14, 1985); 50 Fed. Reg. 25252-253 (June 18, 1985).

[6] *See* 58 Fed. Reg. 17024 (App. 136a); 50 Fed. Reg. 31724 (Aug. 6, 1985); 50 Fed. Reg. 25252-253 (June 18, 1985).

BEST AVAIL

On January 23, 1989, over four years after the AFA petition for rulemaking was filed, the FAA issued a Denial of Rulemaking, finding that "the information, views, and arguments contained in the two petitions do not warrant the action sought." *In the Matter of the Petition of The Association of Flight Attendants and the Joint Council of Flight Attendant Unions to Amend Parts 121 and 135 of Federal Aviation Regulations*, Docket No. 24397, Denial of Petition, p. 4 (the "January 23, 1989 FAA Decision") (App. 91a). The FAA specifically determined,

> [T]here is no empirical evidence that shows any correlation between flight attendant duty time, flight attendant safety duties, and risk to passengers. For that reason there is no reasonable method to determine requirements for cost beneficial flight attendant duty times directly related to safety. There is no showing that the unrelated instances cited in a few comments of lengthy flight attendant duty time either were the result of work rules mandated by the company, or were systematic throughout the industry. Nor was there a showing that these instances had an adverse impact on safety. The cost to the carriers of administering the proposed rules, and to the FAA in enforcing them, thus cannot be justified based on any empirical or reasonably estimated safety benefit.

Id. (App. 91a). The FAA concluded that the requested rulemaking was "not in the public interest." *Id.* (App. 92a).

On January 24, 1989, H.R. 638, a bill providing for the establishment of the flight attendant duty period limitations and rest requirements was introduced in the 102nd Congress. At a hearing before the Subcommittee on Aviation of the House Committee on Public Works and Transportation on May 17, 1989, the FAA Associate Administrator for Regulation and Certification advised the subcommittee of the agency's intent to initiate new

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studies of flight attendant scheduling practices. NPRM, 58 Fed. Reg. 17025 (App. 138a).

B. The Industry Study.

Four months following its testimony on H.R. 638, the FAA issued an industry study on flight attendant scheduling practices. FAA, REPORT ON THE STUDY OF CURRENT INDUSTRY PRACTICE—Flight ATTENDANT FLIGHT, DUTY, AND REST TIMES (September 12, 1989) (the "Industry Study"). The Industry Study undertook a comprehensive review of U.S. air carrier flight attendant scheduling practices and actual work hours of flight attendants. The data collected for the Industry Study indicated that certain types of problems related to flight attendant duty hours may occur more frequently in certain industry segments. The Industry Study also noted that a variety of mechanisms were in place throughout the industry to respond to such problems. NPRM, 58 Fed. Reg. 17025 (App. 138a). No later analysis or compilation of relevant data regarding flight attendant scheduling practices since the 1989 Industry Study has been undertaken by the FAA.

C. The March 13, 1991 Hearing.

Flight attendant duty limitations and rest requirements continued to be the subject of congressional debate. On March 13, 1991, eighteen months after the Industry Study was issued, the FAA participated in a hearing held by the Aviation Subcommittee of the House Committee on Public Works and Transportation on the specific subject of flight attendant duty and rest. *See Flight Attendant Duty Time Limitations: Hearing Before the Subcommittee on Aviation of the House Committee on Public Works And Transportation*, 102nd Cong., 1st Sess. 8 (March 13, 1991) (testimony of Anthony J. Broderick, Assoc. Admin. for Reg. and Cert., FAA) (the "March 13, 1991 FAA Testimony") (App. 93a-132a). The FAA

did not recommend rulemaking at that hearing.[7] The FAA stated that the data reported by the Industry Study were not "dispositive", but that "Should research results or other data suggest in the future that a regulatory solution is appropriate, [the agency would] address that possibility after reviewing that data." March 13, 1991 FAA Testimony, at 8 (App. 95a-96a). The FAA specifically noted that "[t]he preponderance of flight attendant schedules appear[ed] to be well within a zone of reasonableness," while "[s]ome occasional work practices . . . appear[ed] to be excessive." *Id.* (App. 95a). The FAA further observed,

> [T]here are no readily quantifiable safety benefits that we can identify to offset the cost [of flight attendant duty limitations]. This is a fact which we noted in denying the flight attendant union positions [in 1989], and it remains undisputed today.
>
> Data from 1975 through 1989 showed that approximately 38,000 air carrier passengers and several thousand additional crew were aboard aircraft involved in evacuation or evacuation-related occurrences. We have been unable to identify a single incident in that array, however, that fairly could be said to have adversely been affected by flight attendant fatigue. In other words, the data do not identify flight attendant fatigue as a factor.
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> * * * *
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> In this instance, based on the absence of demonstrable, quantifiable benefits to the traveling public that would offset the clear costs of the rule, the Administration has concluded that rulemaking is not warranted.

March 13, 1991 FAA Testimony, p. 8 (App. 95a-96a).

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[7] Final Rule, 59 Fed. Reg. 42974 (App. 8a); NPRM, 58 Fed. Reg. 17025 (App. 139a); March 13, 1991 FAA Testimony, 8-9 (App. 95a-96a).

D. The Final Rule.

Eighteen months after the FAA testified before Congress that the Industry Study produced no data or conclusions that supported rulemaking, the FAA issued the NPRM in Docket No. 27229, stating, "the results of the study suggest the need for regulatory action, which is provided by this NPRM." *See* NPRM, 58 Fed. Reg. 17024, 17025 (App. 138a). The NPRM began with a brief overview of the history of previous attempts to implement flight attendant duty limitations and rest requirements. The NPRM mentioned, but did not discuss, the two prior petitions filed by the AFA and JCFA in 1984 and 1985, some of the comments filed in support of the petitions in Docket No. 24397, and the FAA's decision to deny the rulemaking petitions. *Id.* at 17024-025 (App. 135a-138a).

The FAA received fifty-one comments in response to the NPRM. Commenters that supported adoption of flight attendant duty period limitations and rest requirements in Docket No. 27229 included the Coalition of Flight Attendant Unions (comprised of the AFA and previous members of JCFA), individual flight attendants, the NTSB, ALPA, IAPA, Wright State, and a member of Congress who strongly supported the comments of the Coalition of Flight Attendant Unions. Final Rule, 59 Fed. Reg. 42975 (App. 8a-9a); Index of FAA Docket No. 27229.

The FAA issued the Final Rule on August 19, 1994. The Final Rule requires that scheduled duty periods for flight attendants may not exceed 14 hours. Two-hour increments of additional duty time may be gained if the carrier augments the required crew complement by one additional flight attendant for each two-hour period gained up to the allowed maximum duty period of 18 hours, or 20 hours if the scheduled duty period includes one or more flights that take off or land outside the 48 contiguous states. Final Rule, 59 Fed. Reg. 42977-978

(App. 17a-21a). The Final Rule also requires a minimum rest period of nine hours for a duty period assignment of 14 hours or less, and 12 hours if the duty period exceeds 14 hours. Final Rule, 59 Fed. Reg. 42979-980 (App. 24a-29a).

The Final Rule provides air carriers the option of applying flight crewmember (*i.e.* pilot) flight, duty and rest requirements to flight attendants. An air carrier electing this option must establish written procedures for applying the requirements. Such procedures must be approved by the Administrator of the FAA prior to implementation and must be applied to all flight attendants used in the air carrier's operations. Final Rule, 59 Fed. Reg. 42975-976 (App. 10a-14a).

II. PROCEEDINGS BEFORE THE COURT OF APPEALS.

On September 1, 1994, Sun Country filed a petition for review of the Final Rule in the Court of Appeals. To maintain the *status quo* pending outcome of judicial review before the Court of Appeals, Sun Country filed an emergency motion for stay of the compliance date of the Final Rule with the court on February 1, 1995, based upon the four-prong test for issuance of a stay enunciated in *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) and *Washington Metropolitan Area Transit Comm'n.* v. *Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). On February 13, 1995, the Court of Appeals entered an order staying the compliance date of the Final Rule and expediting consideration of the case.[8] The Court of Appeals heard oral argument on

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[8] The Court of Appeals expedited the proceeding on its own motion without explanation, although perceived safety considerations of the Final Rule may have contributed to the court's decision. The FAA, in response to Sun Country's emergency motion for stay, unsuccessfully argued that Sun Country's failure to seek expedited action from the Court of Appeals rendered its claim of irreparable harm specious. Accordingly, Sun Country, in the pres-

May 19, 1995, and issued its decision denying Sun Country's petition for review on May 30, 1995 (App. 1a-3a).

Before the Court of Appeals, Sun Country maintained that the FAA's promulgation of the Final Rule, which represented a reversal of its decision in 1989 not to promulgate essentially the same flight attendant duty period limitations and rest requirements, was arbitrary and capricious because the agency did not sufficiently articulate a reasoned analysis in support of the change of position. Sun Country specifically argued in its briefs that the FAA Industry Study could not provide the necessary factual predicate for the Final Rule because (1) the Industry Study was flawed according to its terms and (2) the FAA as late as March 1991 testified before Congress that the data reported by the Industry Study did not support rulemaking.[9]

In its May 30, 1995 opinion, the Court concluded that the FAA, in its Docket No. 27229, adequately carried its burden to supply a reasoned analysis in support of the agency's change of position. In support of its decision, the Court found:

> The FAA's notice of proposed rulemaking, and final rule, both make clear that the agency's 1989 study of flight attendant flight, duty, and rest times in the air carrier industry prompted it to rethink its earlier decision. Significantly, when the FAA rejected proposed flight attendant duty period scheduling rules in 1989, it specifically noted the absence of any clear information concerning flight attendant duty time. The 1989 study furnished the information that was previously missing and caused the agency to rethink the premises underlying its original position. Thus, it is clear from the record and from the agency's

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ent proceeding, will not object if respondent FAA seeks expedited consideration of any aspect of this case.

[9] *See* Sun Country Final Brief, pp. 13-15, n.8 (April 21, 1995); Sun Country Reply Brief, pp. 12-15 (April 18, 1995).

> stated rationale that it adopted a new position based on new information.
>
> While the FAA ideally could have explained its view more fully, it is a well-established principle of administrative law that we may "uphold a decision of less than ideal clarity if the agency's path may be reasonably discerned." Here, the agency's path is tolerably discernable. . . .

Slip op., pp. 1-2 (App. 2a) (internal citations omitted).

The Court of Appeals denied Sun Country's timely petition for rehearing and suggestion for rehearing *in banc* on July 28, 1995 (App. 86a). To preserve the *status quo* pending a petition for *certiorari*, Sun Country filed a motion for a 30-day stay of mandate with the Court of Appeals on August 3, 1995, which was denied on August 24, 1995. The Court of Appeals issued its mandate on August 25, 1995.

REASONS FOR GRANTING THE PETITION

The Supreme Court's decision in *State Farm* requires that an agency which reverses a prior decision must state a "reasoned analysis" for the change as part of the agency's articulation of a "satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983).

In the administrative proceeding below, the FAA reversed its prior decision not to promulgate essentially the same flight attendant duty period and rest regulations that were adopted in Docket No. 27229. Although the FAA mentioned its prior inconsistent position, the FAA provided no reasoned analysis that explained the agency's reasons for taking a different course. Further clarification of the Supreme Court's decision in *State Farm* is needed to ensure that administrative agencies confront reversals

of policy squarely and explain why the departure is reasonable.

In its decision issued May 30, 1995, the Court of Appeals concluded that the FAA's 1989 Industry Study of flight attendant duty times prompted the agency to rethink its prior decision not to promulgate essentially the same flight attendant duty period and rest requirements. The FAA's March 1991 testimony before Congress, however, makes clear that the agency believed the Industry Study provided no new data or information that would justify adoption of the flight attendant duty regulations then under consideration. Notwithstanding the Court of Appeals' conclusion, the administrative record in this proceeding proves that the agency's stated rationale for the reversal is wholly inaccurate and that the Industry Study cannot provide the factual predicate for the required rational connection between the facts and the choice made.

The error committed by the Court of Appeals emphasizes the FAA's lack of a stated rationale for reversal of the agency's 1989 denial of rulemaking. The Court of Appeals' use of the "reasonably discernible" rubric as a substitute for the agency's own reasoned analysis emasculates the arbitrary and capricious standard of the Administrative Procedure Act (the "APA"). In contravention of this Court's pronouncement in *State Farm*, the Court of Appeals attempted to make up for the agency's deficient analysis and supplied a basis for the FAA's actions that the agency did not itself articulate and, moreover, one which is proven erroneous by the administrative record.

Clarification of the Supreme Court's decision in *State Farm* is needed to ensure consistent application of the arbitrary and capricious test as it pertains to reversals of agency positions. While *State Farm* teaches that an agency reversal requires a reasoned analysis for the change, the

opinion provides little guidance as to what may constitute a reasoned analysis.

In addition, the Court of Appeals' decision in this proceeding is in apparent conflict with the First Circuit's decision in *Citizens Awareness Network, Inc.* v. *FCC*, 59 F.3d 284 (1st Cir. 1995), the Sixth Circuit's decision in *Radio Ass'n on Defending Airwave Rights, Inc.* v. *DOT*, 47 F.3d 794 (6th Cir. 1995) and the D.C. Circuit's decision in *United Video, Inc.* v. *FCC*, 890 F.2d 1173 (D.C. Cir. 1989).

The Court of Appeals' gross misapplication of the standard enunciated by the Supreme Court for reviewing agency reversals of position, combined with the apparent conflict between the Court of Appeals' decision and the decisions of other Circuit Courts of Appeals, presents a substantial question deserving of Supreme Court review and may warrant summary disposition under Supreme Court Rule 16.1.

I. THE COURT OF APPEALS' DECISION SERIOUSLY UNDERMINES THE ARBITRARY AND CAPRICIOUS STANDARD ARTICULATED BY THIS COURT IN *STATE FARM*.

In *State Farm*, this Court considered an agency's revocation of a regulation promulgated under a previous administration. The Court determined that, in such an instance, "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *Id.* at 42. This burden of additional explanation, however, does not intensify the scope of review under the arbitrary and capricious test. *Id.* at 41, 44. Any agency, even one reversing a course of conduct, must "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' " *Id.* at 43 (quoting *Burling-*

ton Truck Lines v. *United States,* 371 U.S. 156, 168 (1962)). One aspect of the required satisfactory explanation, however, is a stated justification for any reversal of position. *Id.* at 52.

In January 1989, and again in March 1991, the FAA determined that there was no warrant for the very kind of duty period limitations and rest requirements which were adopted by the agency in 1994. Throughout the administrative record in Docket No. 27229, the FAA merely reiterated data and arguments that were presented to, and rejected by, the agency long before the current rulemaking was initiated. The NPRM and Final Rule simply mentioned the FAA's prior refusals to establish essentially the same flight attendant duty time limitations supported by essentially the same arguments made by mostly the same commenters, but provided *no* reasoned analysis for the different conclusion in 1994. Given this context, the FAA should have explained what had happened in five years to justify this complete reversal or, if nothing had happened, why the earlier determination had been wrong from the start.

Rather than remanding the Final Rule to the FAA for its failure to supply a reasoned analysis for the change, the Court of Appeals relied upon certain language in *State Farm* which allows a reviewing court to uphold a decision of "less than ideal clarity" if the agency's path may be "reasonably discerned." App. 2a. The Court of Appeals determined that the Final Rule and NPRM both make clear that the FAA's 1989 Industry Study provided new information that prompted it to rethink its earlier decision. The Court of Appeals concluded that "While the FAA ideally could have explained its view more fully, . . . the agency's path [was] tolerably discernable." App. 2a.

The Court of Appeals ignored the fact, explicit in the administrative record, that, on March 13, 1991, more than eighteen months after issuance of the Industry Study,

the FAA did not recommend rulemaking for flight attendant duty period limitations during testimony given to the Aviation Subcommittee of the House Committee on Public Works and Transportation. Final Rule, 59 Fed. Reg. 42974 (App. 8a); NPRM, 58 Fed. Reg. 17025 (App. 139a); March 13, 1991 FAA Testimony, p. 8 (App. 95a-96a). Examination of the actual transcript of the testimony given to that subcommittee by Mr. Anthony J. Broderick, FAA Associate Administrator for Regulation and Certification, confirms that the FAA found no empirical data reported in the September 1989 Industry Study that supported adoption of flight attendant duty period limitations and rest requirements then under consideration. March 13, 1991 FAA Testimony, p. 8 (App. 95a). This forthright testimony makes clear that the results of the Industry Study led the FAA in 1991 to reach the same conclusion that it reached on January 23, 1989, namely that rulemaking was not warranted. *Id.* (App. 96a); January 23, 1989 FAA Decision, p. 4 (App. 91a).

The March 13, 1991 FAA Testimony proves that the 1989 Industry Study cannot provide the necessary empirical foundation for the 1994 final rule, and refutes both the position of the FAA and the conclusion of the Court of Appeals that the 1989 Industry Study provided new information that was previously missing and caused the agency in 1994 to rethink the premises underlying its original position. No data analysis of flight attendant duty time limitations subsequent to the 1989 Industry Study is known to exist, and certainly no such information appears in the administrative record of FAA Docket No. 27229 that would support the Court of Appeals' incredible conclusion.

Sun Country does not dispute that the 1989 Industry Study, in the absence of a prior contrary decision, might support adoption of the Final Rule by providing the necessary factual foundation for a "rational connection between the facts found and the choice made." But that is not the case here. The FAA determined in January

1989 not to promulgate essentially the same regulations. Moreover, the agency impeached the results of the Industry Study in March 1991 when it reaffirmed its position that rulemaking was not warranted. The September 1989 Industry Study, thus, by itself cannot provide the necessary factual predicate for the rational connection required under the arbitrary and capricious standard.

If the Industry Study could not have prompted the agency to issue the Final Rule, something else must have. If in fact the only thing that has happened since 1991 is that the FAA, under a new administration, has reached a new interpretation of the same data, it is not stated in the administrative record. The FAA has declined to confront its prior decision that directly conflicts with the agency's promulgation of the Final Rule.

In *State Farm*, the Supreme Court admonished reviewing courts against attempting to make up for deficiencies in agency analysis by supplying reasoned explanations that agencies have not themselves given. *State Farm*, 463 U.S. at 43. Further clarification of the arbitrary and capricious test, as it relates to agency reversals, is needed because this admonition in practice often runs counter to the next sentence in *State Farm*, which states that an opinion of less than ideal clarity will be upheld if the agency's path may reasonably be discerned. *Id.* The error committed by the Court of Appeals in this case emphasizes the conflict. The Court of Appeals has committed the exact error against which the Court cautioned in *State Farm*. The FAA provided no reasoned explanation for the change, and the Court of Appeals attempted to provide its own explanation based on what the court determined could reasonably be discerned. What the court discerned, however, is erroneous and contrary to the administrative record.

The Court of Appeals' use of the "reasonably discernable" rubric to sanction the FAA's conduct is a gross misapplication of language in *State Farm* that severely

undermines the requirement that an agency changing its course supply a reasoned analysis for the change. The Court of Appeals' decision, in effect, declares that an agency which reverses a prior decision must do no more than provide a level of analysis for the new decision that would support the decision as if it were one in the first instance, *i.e.* no contrary prior decision existed. Gone is the requirement of *State Farm* and the APA that the agency is obliged to supply a "reasoned analysis" for the reversal itself. *See State Farm*, 463 U.S. at 42. The Court Appeals' approval of the FAA's reversal of position despite the absence of a valid rationale for the change represents a serious and troublesome departure from *State Farm* and the arbitrary and capricious standard of the APA and merits review by this Court.

The gross misapplication of the arbitrary and capricious standard in this proceeding, combined with the clear and undeniable error committed by the Court of Appeals in interpreting the administrative record, make this case particularly appropriate for summary disposition on the merits under Supreme Court Rule 16.1. *See, e.g., Palmer* v. *BRG of Georgia*, 498 U.S. 46 (1990); *City of Newport, Ky.* v. *Iacobucci*, 479 U.S. 92 (1986), *reh'g denied*, 479 U.S. 1047 (1987); *Immigration and Naturalization Service* v. *Hector*, 479 U.S. 85 (1986).

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS OF THE FIRST, SIXTH AND D.C. CIRCUITS.

The Court of Appeals' decision in this case is in apparent conflict with the decisions of the First and Sixth Circuit Courts of Appeals as well as the D.C. Circuit. The First Circuit has held that "when an administrative agency departs significantly from its own precedent, 'it must confront the issue squarely and explain why the departure is reasonable.' " *Citizens Awareness Network, Inc. v. FCC*, 59 F.3d 284, 290 (1st Cir. 1995) (citation

omitted). It is not enough that an agency's subsequent decision stand on its own in terms of factual support and analysis. The agency must explain the reason for the departure. The burden is not a difficult one to meet, but a court cannot supply a reason the agency has not itself given. *Id.* at 291.

In *Citizens Awareness Network*, the First Circuit considered an agency's reversal of regulations, accomplished by circulation of two internal staff memoranda. Notwithstanding the lack of notice and opportunity for comment provided to the public, the First Circuit found most troubling the agency's

> failure to provide in those memos, or anywhere else, any justification or reasoning whatsoever for the change. The memos did not set forth any new facts, fresh information, or changed circumstances which would counsel the shift. Nor did they provide any legal analysis of how the new policy comported with, or at least did not conflict with, existing agency regulations.

Id. As the FCC did not confront its change in position in *Citizens Awareness Network*, the FAA in this proceeding provided no straightforward and valid explanation that squarely confronted the agency's reversal of its 1989 decision not to promulgate essentially the same final rule. The First Circuit's decision in *Citizens Awareness Network* thus conflicts with the Court of Appeals' application of the arbitrary and capricious test in this proceeding.

The decision of the United States Court of Appeals for the Sixth Circuit in *Radio Ass'n on Defending Airwave Rights, Inc.* v. *DOT*, 47 F.3d 794 (6th Cir. 1995), demonstrates that an agency which adopts a regulation despite a prior decision not to promulgate the same rule must not only acknowledge the prior inconsistent position but also must provide a reasoned analysis that explains the departure from agency precedent. In that case, the Sixth Circuit reviewed the promulgation of regulations

by the Federal Highway Administration ("FHWA") banning the use of radar detectors in commercial motor vehicles ("CMVs"). The court noted that FHWA had denied prior petitions for rulemaking for similar regulations, because the agency was concerned with federalism and believed the problem was not national in scope. *Airwave Rights*, 47 F.3d at 798.

The Sixth Circuit noted that the FHWA, in reversing its prior decision not to promulgate a radar detector ban for CMVs, had "analyzed the effects of the rule on the policy-making discretion of the states" and "concluded that 'Consistent with federalism principles, the final rule provides for a federal ban, but provides significant discretion for States in their enforcement.'" *Airwave Rights*, 47 F.3d at 801. FHWA further explained that its previous federalism concerns were erroneous because it had now determined that the safety problem really was national in scope. *Airwave Rights*, 47 F.3d at 805. The Sixth Circuit found that FHWA had provided a sufficient reasoned analysis because it had "properly changed its view of its federalism concern regarding the ban based on a fuller understanding of the national scope of the safety issue . . . ." *Id.*

In *United Video, Inc.* v. *FCC*, 890 F.2d 1173 (D.C. Cir. 1989), the District of Columbia Court of Appeals considered the FCC's reinstatement of its "syndicated exclusivity," or "syndex," rules. The court observed.

> The Commission's report reviews in detail the history of the regulation of cable, including, in particular, the 1980 decision to eliminate syndex rules. The report notes several ways in which the Commission now feels the 1980 decision to have been inadequate . . . . The Commission also faults its earlier studies for focusing on the effects repeal of syndex would have on individual stations . . . The Commission's report in toto suggests that it undertook a thorough review of the syndex question and came to a new result with full awareness of its prior choices. . . .

> [T]he Commission's detailed report assures us that it has given full consideration to the change it made, and explains its reasons for doing so.

United Video, 890 F.2d at 1181-82. The Court thus rejected claims that the FCC's reinstatement of the syndex rules was arbitrary and capricious. *Id.*

These cases demonstrate that proper application of the arbitrary and capricious standard according to the principles articulated by the Supreme Court in *State Farm* requires that an agency reversing its course must provide a reasoned analysis for the change that evinces an awareness of the change and states the reasons for taking a different course.

As a practical matter, the Court of Appeals' decision has broad implications far beyond the facts of this case, and will impact the scope of judicial review of agency action under a wide array of enabling statutes. The Court of Appeals' expansive use of the "reasonably discerned path" language in the Supreme Court's *State Farm* decision substantially lowers the standards for agency conduct under the APA, and warrants review by the Supreme Court.

CONCLUSION

For the foregoing reasons, the petition for writ of *certiorari* should be granted.

Respectfully submitted,

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